
DATE: November 7, 1995

CASE NO.: 89-ERA-22

In the Matter of:

SHANNON T. DOYLE,
Complainant

v.

HYDRO NUCLEAR SERVICES,
Respondent.

Appearances:

STEPHEN M. KOHN, ESQ.
KOHN, KOHN, & COLAPINTO, P.C.
517 Florida Avenue, N.W.
Washington D.C.
On Behalf of the Complainant

HOPE A. COMISKY,
Attorney at Law
Fourteenth Floor
1600 Market Street
Philadelphia, PA 19103
On Behalf of the Respondent

Before: Hon. Richard D. Mills
Administrative Law Judge

RECOMMENDED DECISION AND ORDER ON DAMAGES

The case before me on remand from the Secretary of Labor arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (hereinafter ERA or the

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"Act"), 42 U.S.C. 5851 (1988). In his Decision and Order of Remand, the Secretary directed a hearing on the issue of damages, which in this case encompasses back pay, front pay, compensatory damages, costs, and attorney fees. The hearing took place on December 14, 1994, in Dothan, Alabama.

PROCEDURAL HISTORY

On January 13, 1989, Shannon Doyle (hereinafter "Complainant") filed a complaint with the U.S. Department of Labor asserting that Hydro Nuclear Services (a subsidiary of Westinghouse) (both will hereinafter be referred to as "Respondent") had violated ERA when it failed to hire him as a casual employee to work at the D.C. Cook nuclear power plant during an outage in the fall of 1988 because Complainant refused to sign a release permitting Respondent to perform a background check. In a Recommended Decision and Order, the Administrative Law Judge held that Respondent refused to hire Complainant for a legitimate reason and not for protected activity under the ERA. On March 30, 1994, the Secretary of Labor issued a Final Decision and Order finding that Respondent discriminated against Complainant and violated the ERA when it refused to hire Complainant.

On May 26, 1994, Respondent petitioned the Third Circuit for review of the Secretary of Labor's March 30, 1994 Order. On July 27, 1994, Respondent and the Secretary of Labor moved jointly to remand the case to the Department of Labor for consideration of evidence related to damages. The Third Circuit granted this motion on August 24, 1994. In accordance with the ruling of the Third Circuit, on September 7, 1994, the Secretary of Labor issued an order remanding the case here for further proceedings. On December 14, 1994, this Court held a one day hearing limited to the issue of appropriate remedy and relief which should be awarded to Complainant.

ISSUES

1. A determination as to the period of time for which back pay award should be calculated;

2. Whether Complainant is entitled to compensatory damages, and if so, the amount of those damages;

3. Whether Complainant is entitled to post-judgement interest;

4. Whether Complainant is entitled to reinstatement or, in

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the alternative, front pay.

5. Whether Complainant is entitled to recover out-of-pocket expenses, and if so, the amount of those expenses;

6. Whether Complainant is entitled to injunctive relief.

FINDINGS OF FACT

1. Complainant is a 40-year-old former senior decontamination technician living in Dothan, Alabama. (Tr. 106-107). He is married and has four children ages 17, 15, 14, and 12. (Tr. 106-107). Complainant has a high school equivalency degree and has completed about two years of college. (TR. 106). From March 1971 through March 1974 he served in the U.S. Army.

(TR. 106).

2. From July 1980 to March 1983, Complainant was employed at the J.M. Farley Nuclear Plant operated by Alabama Power Company. (CX-1). During that period he acquired approximately 6000 hours of experience as a Nuclear Operator/Decontamination Technician. (TR. 108). Complainant lived in Farley and commuted to work from his home (TR. 140-142).

3. Complainant testified that he resigned from his job after reporting Alabama Power to the Nuclear Regulatory Commission for safety problems at Farley. (TR. 140-142). Specifically, he believed a design flaw in some Westinghouse equipment had caused a fuel failure and resulted in worker exposure to transuranic materials. (TR. 108-109).

4. Complainant hoped that he would eventually be promoted from a decontamination technician to a health physics technician. (TR. 147).

5. At no time during the job with Alabama Power did Complainant take or pass the national qualifying test needed for promotion to a board-certified health physics technician. (TR. 141).

6. After leaving Farley, Complainant submitted resumes to a number of companies supplying support personnel to the nuclear industry. These companies included Rad Services, NSS, Applied Radiological Control, and NUMANCO. (TR. 109 and 101).

7. After his whistleblowing activity at Farley, Complainant had trouble getting a job reference from Alabama Power. (TR. 142).

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8. In 1987 Complainant was briefly employed as a senior decontamination technician at the Wolf Creek Generating Facility operated by Kansas Gas and Electric. (CX-1), (TR. 113). He left that position after being harassed by co-workers for the previous whistleblowing activity. (TR. 145).

9. In late October, 1988, Complainant was contacted by NUMANCO, a division of Westinghouse Electric Corporation, about a senior decontamination technician job at the D.C. Cook Nuclear Power Plant. (TR. 110).

10. Complainant was considered for employment at D.C. Cook as a non-local, casual decontamination technician for the period of the outage. (Tr. 110-111, 146).

11. A casual employee is one employed for a short time and a limited and temporary purpose.

12. D.C. Cook is a nuclear power plant in Bridgeman, Michigan, owned by I&M Power. (CX-4) For approximately 10

years, Hydro held a contract with D.C. Cook to provide year-round and casual decontamination technicians. (CX-5, pg. 14).

13. Utility companies have planned "outages," which are shutdowns of operations to perform maintenance procedures. Non-local decontamination technicians are hired as casual or temporary employees to work full-time during a particular outage and then are usually laid off at the end of that outage. (Tr. 93-97, 180-182).

14. On October 30, 1988, Complainant received a telephone call from Westinghouse/NUMANCO's personnel office in which he was told that the company had a copy of his resume and asked if he wanted to work for Hydro Nuclear Services, a division of Westinghouse. (Tr. 110).

15. In late October 1988, Mr. Richard McCormick, a recruiter for Hydro and the site coordinator at D.C. Cook Nuclear Power Plant, called Complainant to discuss a senior decontamination technician job at the plant. (TR. 111). Hydro offered Complainant the position at a pay rate of $6.50 per hour for regular time and $9.25 per hour for overtime with a per diem of $48.00 a day without any health benefits included in the offer. (TR. 167), (CX-4, p.6), (CX-3, p. 60).

16. These employment terms were stipulated to by the parties. No time limitation was expressly placed on the duration of the job. (CX-4), (TR. 112).

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17. On November 7, 1988, Complainant arrived at D.C. Cook where he was paid $182.60 for his travel to Michigan and $384 in per diems for November 6 through 13. At Mr. Dan Haynes' instruction, Complainant attended training sessions at D.C. Cook on November 8th. (CX-4, p.6)

18. On November 18, 1988, after Complainant had undergone various employment screening procedures, Mr. Haynes asked him to complete an employment application. Included in the application was an "Authorization for Release of Information and Records" authorizing Complainant's previous employers to release his employment records to Hydro. *Doyle v. Hydro Nuclear Services*, No. 89-ERA-22, Sec. Decision at 1, March 30, 1994. The form included the following paragraph:

> Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results of furnishing or receiving such information pursuant to this authorization. *Id.* at 2.

19. Without the above authorization signed, Hydro would not hire the Complainant. *Id.*

20. Complainant returned the application with the authorization paragraph crossed out. Believing that the paragraph constituted a waiver of his rights under Section 210 of the ERA, Complainant refused to sign another copy of the authorization form unless it was deleted. *Id.*

21. In 1989, Hydro, NUMANCO and Hittman, all subsidiaries of Westinghouse, became "Westinghouse Radiological Services." (CX-5, p.61), (TR. 167).

22. When Westinghouse Staffing Services ("WSS") was formed, Hydro's management team was transferred to WSS and the Nuclear Services Division. (CX-5, pp.66-67). The D.C. Cook contract had previously been assigned to NUMANCO, which had also assumed commercial and operational responsibility for the contracts at Comanche Peak, Indian Point, Farley, Surrey 1 and 2, and North End 1 and 2. (TR. 169-170), (CX-5, pp 68-69).

23. Effective January 7, 1991, Westinghouse entered into a complex sales agreement with Nuclear Support Services, Inc.

("NSSI") (CX-3(c)). As part of the agreement, NSSI took over most of Westinghouse's decontamination operation. (CX-3, p. 25).

24. At the time of the sale, the decontamination work formerly performed by Hydro had been incorporated into NUMANCO. (TR. 169, 188-189). As a consequence of the agreement, the decontamination and health physics technicians working with Westinghouse and Hydro either went to NSSI or became Westinghouse employees. (CX-3, pp. 25-26, 41 and 105).

25. The agreement transferred certain properties and assets of NUMANCO and WISCO (a business unit of NSD) to NSSI. (CX-3(c)). In addition, NSSI was guaranteed to work as a subcontractor for Westinghouse at the nuclear plants for which Hydro/NUMANCO had previously provided services. (CX-3(c)). Consequently, NSSI would be the preferential provider of decontamination technicians at all Westinghouse operations and nuclear facilities at which Westinghouse had the contract to provide decontamination work. (CX 3(c)), (TR. 188-189). Thereafter, if Westinghouse needed decontamination technicians, it would have to obtain them through NSSI. (CX-3, p. 25, 76, 110).

26. In paragraph 7.9.2 of the January 7, 1991 contract, NSSI agreed to the following:

> As of the closing date, NSSI, or its designated subsidiary, shall offer continued employment to those regular and casual employees of NUMANCO and WISCO listed on Schedule 7.9.2. Such offer shall be at substantially comparable wages and benefits in the aggregate, to those provided by Westinghouse as of December 15, 1990.

(CX-3(c), p. 56).

27. Pursuant to this agreement, some decontamination technicians and health physics technicians formerly employed by Westinghouse/Hydro/NUMANCO either obtained employment with NSSI or became permanent employees of Westinghouse.

28. Michael Dansard, one of ten decontamination technicians, hired by Hydro at D.C. Cook at the same time Complainant was hired, was listed on Schedule 7.9.2 among the Westinghouse/NUMANCO employees to be hired by NSSI. The other ten employees were not on the list. (CX-3(c), Schedule 7.9.2), (RX-5), (TR. 234).

29. The ten non-local, casual decontamination technicians hired along with Complainant were scheduled to work for an outage in the fall of 1988 at the D.C. Cook plant.

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30. An "outage" occurs any time that a nuclear plant is out of service. In "planned outages," a plant is brought down for routine maintenance and refueling. Planned outages are regularly scheduled twice a year during the spring and fall when demand for power is low. (CX-3, p. 103). Although planned outages usually last two to three months, sometimes they last for over a year. (TR. 247), (TR. 102).

31. Decontamination technicians are needed during both planned and unplanned outages. (TR. 102-103). Additionally, decontamination technicians are often employed in non-outage situation while a plant is still operating. (TR. 103). Non-outage situations where decontamination technicians are needed can last from a week to four months or longer. (TR. 176).

32. The ten individuals hired along with Complainant worked from November 21, 1988 until the end of that outage on December 31, 1988, with the exception of the weeks ending November 25, 1988 and December 2, 1988. (RX-2-5).

33. These ten individuals were laid off on December 31, 1988. (RX-2-5).

34. The average number of hours worked by these individuals at D.C. Cook from November 25, 1988 through December 31, 1988 was 149.20 hours of regular time and 93.70 hours of overtime. (RX-5).

35. Only three of these ten non-local, casual decontamination technicians returned to work for Hydro at D.C. Cook in 1989. (RX-5).

36. Their subsequent work history at D.C. Cook is as follows: Arbuckle worked for four (4) weeks that year; Nuzum worked for less than three (3) weeks; and Dansard worked for approximately ten (10) weeks. (RX-5).

37. The average number of hours worked by these individuals at D.C. Cook in 1989 was 154.67 regular hours and 61 overtime hours. (RX-5).

38. According to Hydro's wage and tax register, all 10 employees hired with Complainant were on the payroll as of June 30, 1989 and only one of the employees had no income from Hydro during that quarter. (CX-14).

39. Mr. Daniel Haynes explained that these employees did not

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work for Hydro at D.C. Cook, but were instead sent by Hydro to work at other sites. (TR. 238).

40. Hydro managers preferred to hire "returnees" at D.C. Cook because it was easier and more cost effective than bringing in and training new people. (TR. 187-188) Returnees who did good work therefore moved to the top of the hiring list for future outages. (TR. 90, 243). Both the utility and Hydro found it cheaper and more efficient to rehire road technicians previously approved at the site. (CX-5, pp. 20-21).

41. Even if a vendor lost its contract with a nuclear plant, returnees can often keep working at the plant under the new contractor. (TR. 85).

42. It is possible, if a spot became available, that a non-local casual decontamination technician could be hired as a local technician and work full time, although this might mean less income to an employee who receives a substantial amount of per diem as a non-local employee. (CX-5, p. 83).

43. It is possible for a senior decontamination technician to be promoted to a health physics or radiation protection position. (TR. 80, 193). However, a required number of hours as a decontamination technician is required along with a passing mark on a national qualifying health physics test. (TR. 193).

44. Complainant, while working as a decontamination technician, did not take or pass the national qualifying test needed for promotion to a board-certified health physics technician. (TR. 141).

45. After being fired by Hydro, Complainant tried to find employment in the Chicago area by calling a friend whose brother owned a residential construction company in the Chicago suburbs. After meeting his friend's brother and filing an application, Complainant went back to Alabama. Despite several follow-up calls, Complainant was not offered employment. (TR. 117).

46. After filing a complaint with the DOL Wage and Hour Division on December 9, 1988, Mr. Doyle received a two-page document entitled "Unescorted Access Authorization Log Sheet." (CX-8). Complainant obtained the document through a discovery request about six weeks after his discharge from Hydro. (TR.

119). The document showed that Complainant was disqualified for unescorted access at D.C. Cook and that "Chris from Equifax" had been notified on November 22, 1988. (CX-8).

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47. Denial of unescorted access at a nuclear facility essentially denies employment at nuclear facility. (TR. 92, 120-121).

48. The document denying Complainant unescorted access was a Hydro/Westinghouse document. (TR. 118).

49. During January, 1989, Complainant filled out two job applications regarding employment in the atomic energy field. Both applications included the question "have you ever been denied unescorted access at a nuclear facility?" (TR. 121-122).

50. Complainant sent in one application and did not hear back from the company. Complainant did not send the second application because he believed it would have the effect of spreading the adverse fact that he had been denied unescorted access and would ruin his professional reputation. (TR. 121-122).

51. Complainant focused his job search efforts outside the nuclear field after being denied unescorted access by Hydro. (TR. 122).

52. Complainant registered with the Alabama State Employment Agency and with several temporary employment agencies. (TR 126.) Complainant checked help wanted ads in two local newspapers and also in two out-of-town publications. (TR. 126). At different times, Complainant would visit different job sites seeking employment and would even follow construction company trucks to locate potential employers. (TR. 127-128).

53. Complainant also inquired about rejoining the armed forces, registered with local carpentry unions in Birmingham and Pensacola, and used personal contacts to look for employment. (TR. 125, 129).

54. Through a friend who worked for Applied Radiological Control, Complainant again tried to get work in the nuclear industry. When Complainant called his friend to let him know he was looking for a job, the friend suggested that Complainant could work directly for him. He submitted Complainant's resume and recommended him for the position. Complainant never heard back from him, and it was not until later that Complainant learned that he had been turned down. (TR. 125-126).

55. At the time of the hearing, Complainant had a temporary job with Acousti Engineering of Alabama. (TR. 130).

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56. Complainant claims that as a result of feeling stress and pain form his prior whistleblowing activities in 1986 and 1987, and his discharge from Hydro, he experienced symptoms of psychological stress beginning in the spring of 1988. (TR. 46-48, 50, 62-64).

57. After losing his position at Hydro, Complainant consulted a physician for depression and anxiety. He was placed on Xanax, an anti-anxiety, anti-panic medication and, more recently, the antidepressant Zoloft. (TR. 123-124).

58. Complainant also conducted a doctor after experiencing chest pains and was placed first on Ambian, then on Tranzene. (TR. 123-124). Complainant is currently taking Tranzene

59. Altogether, Complainant was seen by three doctors: Dr. Chastain, Dr. Cook, and Dr. Loganthaul, a psychologist. (TR. 123, 154).

60. From November, 1988 until September, 1994, Complainant only saw a psychologist once. At that time, the psychologist, Dr. Loganthaul, prescribed him medications. (Tr. 154).

61. In September, 1994, Complainant first visited Dr. Carter, who diagnosed Complainant as suffering from post traumatic stress disorder ("PTSD") which he believes began in the Spring of 1988. (TR. 65-66, 153-154).

62. Dr. Carter is of the opinion that the Complainant not resume work in the nuclear industry because the Complainant feels that he has been "blackballed" within the industry.

DISCUSSION

Under the Energy Reorganization Act, whistleblowers are entitled to various damages. Under Sec. 210 (b) (2) (B):

> If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph,

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> the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary by the complainant for, or in connection with, the bringing of the

complaint upon which the order was issued.

42 U.S.C. Section 5851 (b) (2) (B).

Once an employee establishes a violation of the Act, there is a "presumption" that the employee is entitled to reinstatement, back pay and the other remedies available under the law. *Artrip v. Ebasco Services, Inc.*, 89-ERA-23, Sec. Dec., March 21, 1995, slip op. at 15.

I. Back Pay

The Complainant here is entitled to back pay. The goal of back pay is to make the victim of discrimination whole and restore him to the position that he would have occupied in the absence of the unlawful discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405. Therefore, the person discriminated against should only recover damages for the period of time he would have worked but for the wrongful termination; he should not recover damages for the time after which his employment would have ended for a nondiscriminatory reason. *Martinez v. El Paso County*, 710 F.2d 1102, 1106 (5th Cir. 1983). For example, back pay liability ends when the contract under which the employee worked is terminated. *Holley v. Northrop Worldwide Aircraft Servs., Inc.*, 835 F.2d 1375, 1377 (11th Cir. 1988).

Complainant contends that he is entitled to back pay from the time he was fired until the date of judgement. Complainant asserts that his back pay should not expire on January 1, 1989, when the particular outage he was hired for ended, because he would have continued his employment with Respondent. The issue to be decided here is whether Complainant would have continued to work for Respondent past the date of his term of employment.

First to be analyzed is the Complainant's term of employment, if any. Road decontamination technicians are technicians who are always working in an outage situation. (TR.80). Road decontamination technicians are also known as contract technicians. (Tr. 80). Provided that there is work available, utilities will keep contract technicians working. (TR. 82). If there is no work available, contract technicians will be laid off but will be

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eligible to be recalled should another outage situation reoccur. (TR. 82-83, 94).

From the testimony of Mrs. Yvonne Henderson, it is clear that road/contract decontamination technicians such as the complainant, are hired to work for an outage situation, then they are laid off until another outage situation arises. (TR. 82-83, 94). When the next outage situation occurs, those employees that were laid off are not automatically rehired. (TR. 94). Instead, they go through a screening process where their resumes are once again examined and past employment performance is evaluated.

(TR. 89, 94). If an employee has performed well in past outages and he/she meets all the qualifications of the utility, he/she may be preferred over employees who have not worked for that particular utility. (TR. 89). However, there is no guarantee that an employee will be rehired.

It is evident that road/contract decontamination technicians work for a period of time depending on the length of the outage. There is no "fixed term" contract of employment, but this may be true only because there is no fixed term outage. Road/contract decontamination technicians are hired with the knowledge that their period of employment is the same as the period of the outage. Complainant is no different in this regard. In sum, the term of employment offered to Complainant resembles a fixed term contract and shall be treated as such.

Complainant's term of employment was from November 21, 1988, the start of the outage, until December 31, 1988, the end of the outage.

Absent evidence that Complainants employment would have continued past the end of the outage (January 1, 1989), Respondents back pay liability should end on that day. *Blackburn v. Martin*, 982 F.2d 125, 129 (4th Cir. 1992). In cases of fixed term contracts, a complainant must initially introduce some evidence showing that the economic injury resulting from the discharge extended beyond the employment term. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1362 (11th Cir. 1982). This proof may consist of no more than a showing that the particular complainant's contract had been renewed in the past, that contracts of similarly situated employees had been renewed, or that the employer had made a promise of continued employment. *Id*.

Complainants also have the initial burden of establishing the economic injury resulting from the adverse employment action. *Marks v. Prattco*, 633 F.2d 1122, 1125 (5th Cir. 1981). Not until

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a complainant establishes what he contends are his damages, will the burden of going forward to rebut the damage claim fall on a respondent. *Accord Taylor v. Phillips Industries, Inc.*, 593 F.2d 783, 787 (7th Cir. 1979). Once a complainant carries his burdens, then the burden of proof shifts to the Respondent to show by a preponderance of the evidence that the complainant would not have remained in employment beyond the contract term. *Walker*, 684 F.2d at 1361.

Complainant, in order to be recover damages past January 1, 1989, must show that his contract would have been renewed or that similarly situated employees contracts have been renewed. In addition, Complainant must show the amount of damages he is entitled to.

Complainant testified that he had hoped to remain employed at D.C. Cook as a permanent employee. (TR. 115). Complainant

also hoped that he would be promoted, at a minimum, to a senior health physics technician. (TR. 115). Complainant attempts to substantiate his claim that he would have remained in the employ of Respondent by offering the payroll records of Westinghouse which show the ten employees hired with the Complainant as being on the Respondent's payroll as of June 30, 1990. (CX-14). Respondent has countered by offering time sheets showing that only three out of the ten employees hired with Complainant worked for Hydro at D.C. Cook in 1989. (RX-5). And only one of the three worked substantial hours. (RX-5). Construing the evidence above as being accurate leads to the conclusion that the employees hired at the same time as the Complainant did indeed continue some kind of employment with the Respondent well into 1989. However, comparing the evidence makes it clear that the majority of time spent working for the Respondent was done at nuclear plants other than D.C. Cook.

In *Blackburn*, an electrician employed by Metric was fired after refusing to work without protection in a nuclear containment area. All 45 electricians hired for the project were laid off and only two of the 45 ever returned to work with Metric. *Blackburn*, 982 F.2d at 129. The court found that the plaintiff failed to present evidence that his employment would have continued absent the discrimination. *Id*. In *Welch v. University of Texas*, 659 F.2d 531, 535 (5th Cir. Unit A 1981), it was pure speculation whether or not an employee would have been shifted to another grant job after the grant which was providing the funds for her salary had expired. The court found that mere speculation was not enough and that the award for damages was limited to the date that the grant under which she was working expired. *Id*.

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This brings us back to *Walker* which notes a critical factual difference between *Welch* and other employee discharge cases involving fixed term employment:

> [The] teacher cases invariably included evidence that either the particular teacher's limited-term contract had been renewed in prior years or else that the school system involved typically had renewed teacher contracts.

684 at 1362.

Again, in *Walker*, a plaintiff must introduce some evidence showing that the economic injury resulting from the discharge extended beyond the employment term and this proof may consist of no more than a showing that the plaintiff's contract had been renewed in the past or that contracts of similarly situated employees had been renewed, or that the employer had made a promise of continued employment. *Id*.

Complainant asserts that his goal in working for Respondent was to become a full-time, permanent senior health physics technician. (TR. 115). Complainant's post hearing brief asserted

that Complainant expected that he could be "rolled over" into a permanent job with D.C. Cook. (See Complainant's post hearing brief, pages 14-15). In examining the evidence, if the scope of evidence considered is limited to only D.C. Cook, then Complainant cannot recover damages for back pay past the date of the end of the outage for which he was hired. This is because the evidence concerning the D.C. Cook facility is far too speculative. However, if job sites other than D.C. Cook are considered in determining Complainant's prospects of being rehired, than the evidence is ample enough to infer that Complainant would have been at least re-hired at a different plant.

It is beyond a doubt, that as a road technician, Complainant would go where he could find work. Had there been no prospects for future employment at the D.C. Cook plant, Complainant undeniably would have sought employment at another plant under contract with Hydro/Westinghouse. Complainant has demonstrated that similarly situated employees were regularly retained and rehired by Respondent. Therefore, Respondent is liable for back pay beyond the original term of employment.

Further, Respondent is liable for back pay beyond the initial outage date because Respondent was directly responsible for the denial of Complainant's security clearance. The document denying Complainant clearance was a Hydro/Westinghouse document. (TR. 119). Once a workers clearance is denied, it is unlikely that the

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worker will ever find employment in the nuclear industry again. (TR. 92, 120-121). In effect, this denial "blackballed" Complainant from the nuclear field and had the result of continuing Complainant's economic injury far beyond the initial period of employment.

Complainant has therefore shown that his economic injury resulting from the Respondent's discriminatory act extended beyond his employment period. Under *Walker*, Respondent now bears the burden of showing that the Complainant would not have been employed past the initial D.C. Cook outage. *Walker*, 684 F.2d at 1362. This, Respondent has not done.

In sum, Complainant has not presented sufficient evidence that would support his contention that he would have been rehired by Hydro at D.C. Cook. However, the evidence is clear that similarly situated employees found work at other nuclear facilities under Hydro/Westinghouse contracts. As a road technician, Complainant would have also found employment at other nuclear facilities under Hydro/Westinghouse contracts. Further, Complainant would have been likely to find employment at nuclear facilities not under Hydro/Westinghouse contracts but for the denial of unescorted access given to Complainant. Therefore I find that Complainant is entitled to back pay dating from his discharge to the present.

Complainant would have received $6.50 per hour of regular

pay and $9.25 per hour of overtime pay at 72 hours per week. (CX-4, p.6). Complainant in this case has asked for six months of back pay per year. Complainant would have earned $260.00 per week of regular pay (40 hrs x $6.50), and $296.00 per week of overtime pay (32 hrs x $9.25) for a total of $556.00 per week. At 26 weeks of work per year, Complainant would have earned a total of $14,456.00 of pay each year. The award of back pay will continue up until the date of this decision.

Also considered in the back pay calculation is the amount of interim earnings made by the Complainant during the back pay period. Interim earnings in replacement employment should be deducted from a back pay award. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4, Sec. Dec. and Order, Oct. 30, 1991. The employer, and not the complainant, bears the burden of proving a deduction from back pay on account of interim earnings. *Hadley v. Southeast Coop. Serv. Co.*, 86-STA-24, Sec. Dec. and Order, June 28, 1991. Here, the only evidence of any interim earnings has been presented by the Complainant. Since Respondent has offered no evidence of interim earnings, only the interim earnings presented by the Complainant will be used in deducting from Complainant's back pay

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award. These interim earnings are as follows:

1) $2443.78 from Acousti Engineering of Alabama, Inc.;
2) $258.00 from Space Science Services, Inc.;
3) $389.55 from Doyle Construction;
Total= $3091.33

Complainant is also entitled to all appropriate prejudgment interest on the award of back pay. Such interest will be calculated in accordance with 29 CFR 20.58(a), at the rate specified in the Internal Revenue Code at 26 U.S.C. 6621.

II. Per Diem payments

Complainant would like the $48 dollar per diem included in his back pay calculation. As stated previously, the goal of back pay is to make the victim of discrimination whole and restore him to the position that he would have occupied in the absence of the unlawful discrimination. Per diem payments are designed to cover the living expenses of the road decontamination technician while he is employed at a job site far away from home. Per diem payments make an employee "whole" as far as covering the living expenses while actually performing the job. Absent the actual performance of the job and the living away from home, per diem is a windfall to Complainant and not part of the make whole policy. Thus recovery of per diem payments is denied.

III. Mitigation of Damages

Although Complainant is entitled to back pay from the date of his discharge until the date of reinstatement, this period may be limited if it is found that Complainant failed to mitigate his damages. Complainant has a duty to make reasonable attempts to

mitigate his damages by seeking suitable or comparable employment with reasonable diligence. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982).

The Complainant has the original burden of ascertaining and showing the gross back pay amount owed to him. *NLRB v. United Contractors, Inc.*, 713 F.2d 1322, 1330 (7th Cir. 1983). Because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, unrealistic exactitude in calculating damages is not required and uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the employer. *Lederhaus v. Pascher*, No. 91-ERA-13, Decision and Order of SOL at 10 (Oct. 26, 1992), quoting *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975). Complainant has fulfilled this burden by

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showing the wages earned per hour ($6.50/hour regular pay, $9.25/hr overtime pay, $48.00/day per diem pay) and the approximate time he would have been employed (six months per year or more). The approximate time Complainant would have been employed by Respondent is an amount that is subject to some degree of speculation as contract employees can work anywhere from one month out of the year to eleven or twelve months out of the year. However, as noted above, exactitude is not required. Therefore, as suggested by Complainant in his post hearing brief, a fair and reasonable amount of time of six months per year shall be used to calculate damages.

Once Complainant has fulfilled his burden or showing a gross back pay amount, the burden then shifts to the employer to establish facts which mitigate its liability. *NLRB v. United Contractors*, 713 F.2d at 1330; *NLRB v. NHE/Freeway, Inc.*, 545 F.2d 592, 593 (7th Cir. 1976); *Sprogis v. United Airlines, Inc.*, 517 F.2d 387, 392 (7th Cir. 1975). The employer has an affirmative obligation to show that:

1) the Complainant failed to exercise reasonable diligence to mitigate his damages, and
2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence. *Hanna v. American Motors Corp.*, 724 F.2d 1300, 1307 (7th Cir. 1984); *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 159 (7th Cir. 1981).

Respondent must first show that Complainant failed to exercise reasonable diligence in obtaining comparable employment since November 21, 1988 (the day of Complainants discharge). Reasonable diligence in seeking comparable employment includes checking want ads, registering with employment agencies, and discussing employment opportunities with friends and acquaintances. *Sprogis*, 517 F.2d at 392.

Here, Respondent has produced no evidence on the mitigation issue except for Complainant's testimony, which sufficiently shows reasonable diligence. Complainant, on the other hand,

testified that he had previously submitted applications to every decontamination service he had been aware of. (TR. 109). Complainant also registered with the Alabama State Employment Agency and several temporary agencies, regularly checked the help wanted ads, applied in person at numerous construction sites, applied to the U.S. armed forces, and tried to use personal contacts to find work in the construction and nuclear service fields. (TR. 125-129). Complainant has also sought employment during the time he has operated his part-time fish farming

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business. (TR. 134-135).

Respondent has not brought forth any evidence that Complainant has not used reasonable diligence. Respondent does allege that Complainant has not used reasonable diligence in seeking further employment in the nuclear field because Complainant only sent in two applications after he was denied unescorted access. This argument fails. First, using reasonable diligence to find comparable work does not mean that the Complainant must focus his job search in the nuclear field. Second, Complainant had been denied unescorted access which is akin to a "death sentence" in the nuclear field. Seeking employment in the nuclear field would have constituted an exercise in futility rather than reasonable diligence. Third, even if Complainant was required to be reasonably diligent in seeking employment in the nuclear field, the burden still rests upon Respondent to show that some sort of employment in the nuclear field was available to him after he had been denied access. This Respondent did not do.

I find, therefore, that Respondent has not met their burden of proof that Complainant failed to mitigate his damages.

IV. Lost Promotional Opportunities

Complainant contends that he is entitled to lost promotions as a result of his wrongful discharge. Specifically, Complainant asserts that he would have attained a position as health physics technician had he not been wrongfully discharged.

To establish lost promotions, Complainant must show: 1) that Complainant had the particular skills or other job-related qualifications required by Respondent to be promoted to health physics technician; 2) that the health physics technician position was in a line of progression upward from the decontamination technician position, that is, the decontamination technician would normally be promoted to health physics technician after some interval of acceptable performance; and 3) that the prerequisite service as a decontamination technician is not itself justified by business necessity aside from the skills or other qualifications to perform the health physics technician job. *Locke v. Kansas City Power and Light Co.*, 660 F.2d 359, 369 (8th Cir. 1981).

Complainant has not fulfilled the first part of the analysis since he did not acquire the hours or the necessary passing grade

on the health physics technicians exam. However, Complainant asserts that had he remained employed with Respondent, he would have accomplished both. Still, Complainant cannot fulfill the

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second part of the test since there is no natural progression from one occupation to the next. Decontamination technicians can remain as such for years without ever becoming health physics technicians. The third part of the analysis need not be addressed.

While it is entirely possible that Complainant would have attained the position of health physics technician, the evidence presented leads only to pure speculation that the promotion would have been realized. As such, no additional back pay can be awarded for a lost promotion.

V. Reinstatement/Front Pay

Reinstatement is a basic remedy provided for under the statute. However, in some cases front pay is awarded in lieu of reinstatement. The statute is silent on the issue of front pay. 42 U.S.C. 5851 (b)(2)(B). However, the remedy of front pay has been developed by the courts and is commonly viewed as prospective relief which may be awarded in cases where reinstatement is not an appropriate remedy. See *McCuiston v. Tennessee Valley Authority*, 89-ERA-6 (1991).

Westinghouse divested its decontamination services in January of 1991. (CX-3). Westinghouse claims that it no longer employs decontamination technicians in any capacity and does not have any positions for which Complainant can qualify. (TR. 70, 174, 200-201).

Dr. Edwin Carter, a clinical psychologist who evaluated Complainant, opined that in light of Complainant's psychological condition, reinstatement with Respondent Westinghouse would be detrimental to him and that retraining followed by employment in another field would be much more beneficial. (TR. 58-59). It would seem that the Complainant would find reinstatement and employment with Respondent a difficult endeavor. His experiences with Respondent would certainly effect his attitude towards them and the damage done to his professional reputation will surely not vanish. Front pay is particularly appropriate where discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy. *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435 (11th Cir.), cert. denied, 474 U.S. 1005 (1985). Therefore I find that the best course of action is to award front pay to Complainant in lieu of reinstatement.

Complainant in this case has asked for five years of front pay. Considering the Complainant's age, this length of time is reasonable. Complainant is entitled to five years of front pay as a decontamination technician. Complainant shall receive $6.50 per

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hour for regular pay and $9.25 per hour for overtime work based on a 72 hour work week. (CX-4, p.6). Complainant is therefore entitled to $556.00 per week. Complainant would have worked approximately six months out of each year or 26 weeks. Complainant is hereby awarded 26 weeks of front pay per year for five years beginning from the date of this decision.

VI. Compensatory Damages

Compensatory damages are awarded to make good or replace the loss caused by the wrong or injury. While the purpose of awarding compensatory damages is not to enable the injured or wronged party to make a profit on the transaction, compensatory damages involve the quantum of hurt to a Complainant resulting from the injury or wrong. The general rule is that a wrongdoer is liable to the person injured in compensatory damages for all of the natural and direct or proximate consequences of his wrongful act or omission, but he is not responsible for the remote consequences of his wrongful act or omission. Natural consequences are such as might have been reasonably foreseen by the wrongdoer.

The measure of compensatory damages is such sum as will compensate the person injured for the loss sustained, with the least burden to the wrongdoer consistent with the idea of fair compensation. 25 Corpus Juris Secundum, Section 71. Compensatory damages may include general damages for mental anguish, for physical pain and suffering, and can include injury to reputation as a compensable psychic injury, which is a portion of emotional distress damages which may include mental anguish, emotional strain, and mental suffering. Nahmod, Civil Rights and Civil Liberties Litigation, Section 4.03, "Compensatory Damages."

It is well settled that damages which are uncertain, contingent or speculative in their nature cannot be recovered as compensatory damages. It is also well settled that compensatory damages cannot by used to punish the employer and that compensatory damages are only those necessary to make a wronged party whole and no more. *Hedden v. Conan Inspection Co.*, No. 82-ERA-3, slip op. of ALJ at 7-8 (1982).

In this case, Complainant testified that he suffered from emotional distress following his discharge by Respondent. Within a year after losing the D.C. Cook position, Complainant consulted a physician and was placed on Xanax for treatment of anxiety. (TR. 123-124). More recently, Complainant was prescribed Zoloft for depression. *Id.* He later began experiencing chest pains, which still recur, and was put on Ambian and Tranzene. (TR. 50, 123-

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124). The prescribing physician attributed Complainant's cardiac condition solely to stress. (TR. 50). In the past six years, Complainant has consulted two physicians and two psychologists for his physical and psychological problems. (TR 42, 123, 154).

The latter psychologist Complainant has consulted, Dr. Carter, concluded that Complainant suffered from an "anxiety-based type of depression" and a "full-blown post-traumatic stress disorder." (CX- 10, p.3). Dr. Carter further concluded that Complainant's psychological problems were permanent in nature and the direct result of his discharge by the Respondent. (TR. 48, 54-55);(CX-10, p.3).

According to Dr. Carter, Complainant's wife and oldest daughter have been seriously affected by Complainant's change in behavior after his unlawful discharge and have experience severe strain and pressure. (TR. 49-51). Complainant's condition resulted in a serious strain in his relationship with his wife. *Id*.

Respondent argues that all of Complainant's emotional problems pre-dated his contact with Hydro. (See Respondent's post hearing brief, p. 31). While the Complainant is not entitled to recover damages for conditions which are due entirely to a previous illness, the Respondent may be liable for damages if his wrongful act aggravated or exacerbated the Complainant's condition. Thus, the wrongdoer is not exonerated from liability if, by reason of some pre-existing condition, his victim is more susceptible to injury, and the Complainant may recover such damages as proximately result for the activation or aggravation of a dormant illness or condition. *Creekmore v. ABB Power Systems*, No. 93-ERA-24 ALJ slip op. at 33 (1984).

If Complainant had a pre-existing condition, this condition was certainly aggravated by Respondent's wrongful act. Being out of work and denied unescorted access at the facility are certainly situations which would result in stress and the aggravation of any anxiety. That the Complainant may have had anxiety problems in the past does not effect Respondent's liability for aggravating or activation those problems.

Complainant may recover compensatory damages for injury to reputation. *Creekmore*, at 37. According to Complainant in *Creekmore*, it was essential to have a credible professional reputation to be accepted in the nuclear industry as a reliable and trustworthy employee. *Id*. at 5. The ALJ agreed, calling the nuclear industry, "an industry which requires impeccable personal

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credentials." *Id*. at 53.

Complainant in the present case needed perfect credentials in order to remain employed in the nuclear field. Contract decontamination technicians were rehired on the basis of their past performances and professional reputations. Once a person's professional reputation was tarnished, chances of continued employment in the nuclear field were greatly diminished. (TR. 89 92,94,120-121).

Complainant suffered irreparable damage to his professional

reputation when he was disqualified for unescorted access at D.C. Cook. Also, this disqualification information was spread outside of D.C. Cook as the document denying Complainant unescorted access also stated that "Chris from Equifax had been notified." (CX-8). Additionally, Complainant was truthful in admitting that he had been denied access on job applications for nuclear industry positions. This also had the effect of spreading the damage to his reputation outside of Westinghouse decontamination services. Finally, Respondent has offered no evidence to rebut the testimony and evidence of the effect of a denial of access on a nuclear employee's reputation.

The Court of Appeals for the Seventh Circuit has taken the approach, when awarding compensatory damages in wrongful discharge cases, to look at the range of awards previously made. *Fleming v. County of Kane, State of Illinois*, 898 F.2d 553 (7th Cir. 1990). In *Fleming*, the Court approved $40,000.00 as within the range for emotional distress arising from the discriminatory discharge. The Court approved the award of $40,000.00 for Fleming's emotional distress as the record in that case does show a rational connection between the evidence and the damage award. The Court noted that the jury accepted Fleming's testimony describing the depression he had suffered during the period in question and his doctors testimony that "the job stress which Fleming experienced during this period may have resulted in an aggravation of his physical condition." *Id.* at 562.

Moreover, the *Fleming* Court's review of those cases where damages for emotional stress are sought led to the conclusion that damage awards in this context have ranged from $500.00 to over $40,000.00. In a similar case, a plaintiff was awarded $35,000.00 in compensatory damages in a race discrimination case. *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1313 (7th Cir. 1985). The ALJ in *Creekmore*, recommended an award of $40,000.00 as compensatory damages for the emotional pain, mental anguish and the emotional stress the complainant experienced, as well as for damage to his reputation in the nuclear power industry. slip op. at 53.

In view of the foregoing precedents, I hereby award Complainant the additional amount of $40,000.00 as compensatory damages for emotional pain, emotional stress and anxiety, and damage to his reputation in the nuclear power industry.

REMEDY

Complainant is entitled to specific damages in the area of back pay dating from the date of discharge to the date of this decision. Appropriate interest shall be paid on the award of back pay in accordance with 26 U.S.C. 6621. Complainant has sustained his burden of mitigating damages as he has sought employment since his date of discharge. Complainant is not entitled to back pay damages for lost promotions as no evidence in the record clearly supports the contention that he was entitled to a promotion as part of the natural progression of his

employment.

Complainant is not entitled to per diem payments as it does not fit the scheme of the "make whole" policy.

Complainant is also entitled to an award of front pay dating from the date of this decision to five years from that date. Complainant will not be reinstated as it is not an appropriate remedy in these circumstances.

Complainant is also entitled to compensatory damages in the amount of $40,000.00 for emotional suffering and loss of professional reputation.

Complainant is also entitled to reasonably incurred medical expenses as a result of his discharge by Respondent. Complainant has only submitted evidence showing a total expense of $291.15.

Complainant is also entitled to a provision herein directing that Respondents immediately expunge from Complainant's personal records all derogatory or negative information contained therein relating to Complainant's work for the Respondents and his termination. Respondent shall also provide neutral employment references and shall not divulge any information pertaining to Complainant's discharge, or the reasons for it, when inquiry is made about Complainant by another employer, organization, or individual. In addition, Respondent shall communicate with Equifax in order to correct the statement made to Equifax that Complainant was denied access to a nuclear facility. In addition, Respondent shall post this Recommended Decision and Order and the Secretary of Labor's decision at Westinghouse's nuclear operations.

ORDER

It is therefore ORDERED that Respondent shall pay to Complainant six months per year of back pay, at a rate of $556.00 per week (or $14,456 per year), from the date of discharge until the date of this order, less interim earnings of $3091.33, plus appropriate interest at the IRS rate, computed until the date of payment to Complainant.

It is further ORDERED that Respondent shall pay to Complainant six months per year of front pay, at a rate of $556.00 per week (or $14,456 per year) from the date of this decision and ending five years from this date.

It is further ORDERED that Respondent shall pay to Complainant $40,000.00 as compensatory damages for emotional suffering and loss of professional reputation.

It is further ORDERED that Respondent shall pay to Complainant all medical expenses for himself and his family that were reasonably incurred as a result of his discharge by Respondent in the amount of $291.15.

It is further ORDERED that Respondent shall immediately

expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's employment with the Respondents and his discharge. Respondent shall also provide neutral employment references and shall not divulge any information pertaining to Complainant's discharge, or the reasons for it, when inquiry is made about Complainant by another employer, organization, or individual. In addition, Respondent shall communicate with Equifax in order to correct the statement made to Equifax that Complainant was denied access to a nuclear facility. In addition, Respondent shall post this Recommended Decision and Order and the Secretary of Labor's decision at Westinghouse's nuclear operations.

It is further ORDERED that Respondent shall pay to Kohn, Kohn, & Colapinto, all reasonably incurred attorney fees and costs.

It is further ORDERED that Counsel for Complainant submit, within a period of twenty days from receipt of this Recommended Decision and Order, any petition for costs and expenses, including attorney's fees. 42 U.S.C. 6971(c). Counsel shall simultaneously serve a copy of this petition on Respondent. Respondent thereafter shall have twenty days to respond to said petition.

Richard D. Mills
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constituion Avenue, N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. *See* 55 Fed. Reg. 13250 (1990).